Supreme Court, U.S.
FILED
MAY 20 1994
OFFICE OF THE CLERK

No. 93-1348

In the Supreme Court of the United States

OCTOBER TERM, 1993

STANLEY E. ADAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court violated Federal Rule of Criminal Procedure 32(c)(3)(D) by failing to rule on all of petitioner's objections to his Presentence Report.

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In the Supreme Court of the United States

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No. 93-1348

STANLEY E. ADAMS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1A) is unpublished, but the judgment is noted at 5 F.3d 529 (Table).[1]

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1993. A petition for rehearing was denied on October 15, 1993. Pet. App. 1B. The petition

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[1] Petitioner includes as Appendix 1 of his petition both the judgment order of the court of appeals affirming his conviction and sentence and the order of the court of appeals denying rehearing and rehearing en banc. We cite the judgment order as Pet. App. 1A and the order denying rehearing as Pet. App. 1B.

for a writ of certiorari was filed on January 18, 1994, and is therefore out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Western District of Texas to conspiring to defraud the United States, in violation of 18 U.S.C. 371, and making false entries in the records of a federally insured financial institution, in violation of 18 U.S.C. 1006. He was sentenced to four years' imprisonment, to be followed by five years of probation; ordered to perform 500 hours of community service; and fined $250,000. The court of appeals affirmed. Pet. App. 1A.

1. Petitioner was the Chairman of the Board of Directors and a member of the loan committee of Lamar Savings Association (Lamar), a financial institution insured by the Federal Savings and Loan Insurance Corporation (FSLIC) and supervised by the Federal Home Loan Bank Board (FHLBB). On June 19, 1985, the FHLBB sent Lamar a letter informing it that its net worth was inadequate. The letter stated that unless action was taken to increase Lamar's net worth, the FHLBB would begin supervising it. Presentence Report (PSR) 3; Stipulation of Facts 1-2.

To avoid FHLBB supervision, petitioner conspired with other officers and employees of Lamar to make false loans that artificially inflated Lamar's apparent net worth. Under that scheme, the conspirators arranged for Lamar to lend money to borrowers who used the money to buy real estate owned by Lamar.

Lamar sold the property to the borrowers for more than its fair market value and told them that they did not have to repay the loans. Both the proceeds of the sales and the false loans were reflected as assets in Lamar's records. As a result of the scheme, petitioner and his co-conspirators deceived federal bank examiners into believing that Lamar had a greater net worth than it actually had, and they thereby avoided FHLBB intervention. Based on the scheme, petitioner pleaded guilty to conspiring to defraud the United States. PSR 3-4; Stipulation of Facts 2.

In September 1985, as part of the scheme, Lamar loaned money to Vijay Parekh, a friend of petitioner and former officer of Lamar. Parekh used the money to buy the Remington House Apartments from Lamar at an artificially high price. The transaction inflated Lamar's apparent net worth by approximately $3 million. Based on the sale of the Remington House Apartments, petitioner pleaded guilty to making false entries in Lamar's financial records. PSR 6-7; Stipulation of Facts 2-4.

2. Petitioner's Presentence Report described the false record entries and sham loans that petitioner and his co-conspirators made to deceive the FHLBB. PSR 1-7; see Gov't C.A. Br. 8-10. In addition, it determined that petitioner and his co-conspirators caused a loss totaling $9,349,579. PSR 1. Before sentencing, petitioner submitted numerous written objections to the PSR. Pet. App. 2.

At the sentencing hearing on February 20, 1992, petitioner told the court that he had entered into a civil agreement with the Federal Deposit Insurance Corporation (FDIC) that relieved him of the obligation to pay restitution in the present criminal case.

2/20/92 Sentencing (Sent.) Tr. 6; see Amended Plea Agreement 3. He asked the court to add a reference to the agreement in the Victim Impact Statement (VIS) section of the PSR, which was the section of the PSR that discussed restitution. 2/20/92 Sent. Tr. 6. Petitioner also asked the court to amend the VIS to refer only to the $78,750 loss caused by the sale of the Remington House Apartments, and not to the total loss of $9,349,579. *Id.* at 9-19. The court agreed to do so. *Id.* at 18-19. Notwithstanding that amendment, the portion of the PSR that calculated petitioner's Salient Factor Score and his Offense Severity Rating—two ratings that affect a prisoner's eligibility for parole—continued to be based on the total loss of $9,349,579. See *id.* at 7, 17-19; PSR 7, 12.

Later in the sentencing hearing, petitioner asked the court to delete the reference to the $78,750 loss caused by the sale of the Remington House Apartments from the VIS portion of the PSR, but the court refused. 2/20/92 Sent. Tr. 19-20. Petitioner then stated he was satisfied with the PSR as it had previously been amended by the court.[2]

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[2] 2/20/92 Sent. Tr. 19-20:

> MR. HAYNES [petitioner's attorney]: Our position on that seventy-eight-five—seventy-eight-seven-fifty, if the court please, was previously articulated.
>
> THE COURT: I understand that, Mr. Haynes, and you've just gotten millions of dollars taken out of there. So let's move on. Seventy-eight-five is nothing compared to what was just taken out of it.
>
> MR. HAYNES: All right, Your Honor.
>
> THE COURT: I mean that's just a suggestion.

The court invited petitioner to allocute (2/20/92 Sent. Tr. 20) and gave petitioner's attorney another opportunity to speak (*id.* at 22). The court asked petitioner and his attorney whether there was "any legal reason why the court should not impose sentence at this time." *Id.* at 26. Petitioner and his attorney answered in the negative. *Ibid.* In imposing sentence, the court stated that it had "reviewed the record * * *, as well as the presentence investigation report." *Ibid.* The court stated that it was sentencing petitioner "[b]ased on that review and the information brought to the attention of the court at this hearing this morning." *Id.* at 26-27. At the end of the hearing, the court asked the parties whether it had "left out anything." *Id.* at 29. Petitioner did not make any additional claims regarding the PSR; his attorney stated: "All right, Your Honor. I think that then covers it." *Id.* at 30.

3. After the sentencing hearing, petitioner filed several motions asking the court for additional amendments to the PSR. On March 13, 1992, petitioner filed a "Motion for Clarification of Rule 32 Motion" (Pet. App. 4), which the court denied on April 16 (*Id.* at 7). On April 24, 1992, petitioner filed a "Supplement to Motion to Correct Pre-Sentence Investigation Report" (*id.* at 8), which the court granted in part on May 8, 1992 (App., *infra*, 1a-2a).

MR. HAYNES: And it's not a suggestion that goes unheeded, Your Honor. I think in response to the court's inquiry then as to the presentence investigation, Your Honor, I have no additional comments to make to the court in view of the court's corrections of the PS[R] as I saw it.

In its Order of May 8, 1992, the court required the probation department to amend the PSR to reflect the findings made at the February 20, 1992, sentencing hearing. Specifically, the court directed the probation department to delete the sentence "The total loss resulting from the conspiracy was $9,349,579" from the VIS portion of the PSR. App., *infra*, 2a. The court further ordered that "the Parole Commission should itself reassess the Report, in light of this deletion, in determining the offense severity rating for [petitioner]." *Ibid.* The court did not, however, order the probation department to amend petitioner's Salient Factor Score or his Offense Severity Rating; they continued to be based on the total loss of $9,349,579 caused by the conspiracy.

In an order dated October 14, 1992, the court made clear that it had not intended to amend the finding of the PSR that petitioner and his co-conspirators caused a total loss of $9,349,579. The court explained that it had meant merely to clarify that petitioner did not owe any restitution in addition to the restitution he had paid under his agreement with the FDIC.[3] The

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[3] Order of October 14, 1992, at 1-2 (App., *infra*, 3a-4a):

> The Court did not mean to suggest that [petitioner] caused no losses by his involvement in the conspiracy. The Court did expressly find that [petitioner] and the Government had settled the amount of restitution owing for all of the losses caused. Specifically, the Court found that [petitioner] owed no further restitution for losses resulting from the conspiracy. Although [petitioner's] conduct did contribute to the losses incurred, [petitioner] and the Government have agreed that [petitioner] has reimbursed the Government for his full share of those losses. Although extensive losses did result, [petitioner] does not owe any additional restitution for those losses. [Petitioner] has fully

court refused to alter the PSR's conclusion, reflected in petitioner's Offense Severity Rating and Salient Factor Score, that petitioner had caused a $9,349,579 loss. The court also explained that no such alteration was required by the court's instruction to the Parole Commission to reassess the PSR in light of the court's amendment of the VIS portion of the PSR. That instruction, the court said, indicated that "[t]he Parole Commission and the Bureau of Prisons should indeed consider as a factor favorable to [petitioner] that [petitioner] has made full restitution to the Government in the present action and that [petitioner] owes no further restitution to the Government in this action." App., *infra*, 4a.[4]

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paid any restitution that he owed to the Government in this action.

[4] Petitioner states (Pet. 6) that "[o]n April 24, 1992, the District Court ordered that the appropriate correction be made to the Defendant's PS[R] in accord with the findings made on February 20, 1992 at the sentencing hearing. (Appendix 9)." Appendix 9 to the petition in this case purports to be an order requiring the probation department to amend petitioner's PSR so that his Salient Factor Score and Offense Severity Rating are based on a loss of $78,750, rather than a loss of $9,349,579. In fact, the district court did not issue that order. Counsel for petitioner has confirmed (App., *infra*, 5a-6a) that Appendix 9 is a copy of a *proposed* order that he submitted to the district court but that was never signed or otherwise adopted by the court. (In addition, the proposed order reproduced in Appendix 9 does not appear in the district court's file, perhaps because the original file in this case was lost and later reconstructed. See Docket Sheet 5 (entry of Nov. 9, 1992)).

The appendix to the petition contains two other proposed orders, not specifically designated as such, that were not signed or otherwise adopted by the district court. Beginning at page 6 of Appendix 5 is a proposed order appended to the govern-

4. On appeal, petitioner claimed that the district court had not resolved all of the disputed factual issues at sentencing, as required by Fed. R. Crim. P. 32(c)(3)(D). Pet. C.A. Br. 16-18. The court of appeals affirmed in an unpublished judgment order. Pet. App. 1A.

ARGUMENT

1. Petitioner renews his contention (Pet. 9-30) that the district court erred by failing to resolve all disputed factual issues at sentencing. That contention is without merit.

Under Federal Rule of Criminal Procedure 32(c)(3)(D), the district court was required, "as to each matter controverted" in petitioner's PSR, to "make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing."[5] In applying the rule, the courts of appeals have recognized that a defendant may waive objections to alleged inaccuracies in the Presentence Report by failing to raise them, and that he may withdraw an objection after it is made. See,

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ment's Response to petitioner's Motion for Clarification of Rule 32 Motion. Following page 8 of Appendix 8 is a proposed order filed with petitioner's Supplement to Motion to Correct the Pre-Sentence Investigation Report.

[5] Rule 32 was amended by the Sentencing Reform Act of 1984, but subsection (c)(3)(D) of the rule was not substantially altered. Sentencing Reform Act of 1984 (1984 Act), Pub. L. No. 98-473, Tit. II, ch. II, § 215(a), 98 Stat. 2014. The portion of the rule quoted in the text appears in both versions of the rule. The pre-amendment version of the rule applies to petitioner because he committed his crimes before November 1, 1987. 1984 Act § 235, 98 Stat. 2031.

e.g., *Martorana* v. *United States*, 873 F.2d 283, 284 (11th Cir. 1989) (per curiam) ("There is no question that [a] defendant can waive the requirements of Rule 32(c)(3)(D)."); *United States* v. *Hipolito-Sanchez*, 998 F.2d 594, 596 (8th Cir. 1993) (per curiam) ("Although [the defendant] objected to various portions of the PSR, * * * he withdrew his objections at the sentencing hearing. * * * Because [he] withdrew any objection he had to the PSR's determination * * *, he waived his right to challenge that [determination] on appeal."); *United States* v. *Mapp*, 990 F.2d 58, 60-61 (2d Cir. 1993); *United States* v. *Citro*, 938 F.2d 1431, 1441 n.18 (1st Cir. 1991), certs. denied, 112 S. Ct. 902, 112 S. Ct. 1997 (1992); *United States* v. *Scott*, 914 F.2d 959, 962 (7th Cir. 1990). Thus, the rule does not require the district court to make findings when a defendant raises an objection, but later withdraws it.

Contrary to petitioner's contention (Pet. 16), he withdrew his unresolved objections to the PSR at the sentencing hearing. Although petitioner filed numerous written objections to the PSR, he admitted at sentencing that "the substance of [his] objection" concerned the amount of the loss caused by his crimes "and assessing dollar figures there that [he did not] agree with." 2/20/92 Sent. Tr. 2-3; see also Pet. App. 3. With regard to that issue, the district court fully complied with Rule 32(c)(3)(D), upholding the PSR's finding that petitioner was responsible for causing a $9,349,579 loss, but concluding that because of petitioner's civil agreement with the FDIC, the VIS portion of the PSR should be amended to reflect only the $78,750 loss caused by the sale of the Remington House Apartments. After the district court made its determination concerning the loss at sentencing,

petitioner stated (2/22/90 Sent. Tr. 19-20): "[I]n response to the court's inquiry then as to the presentence investigation, Your Honor, I have no additional comments to make to the court in view of the court's corrections of the PS[R] as I saw it." Petitioner also indicated that there was no "legal reason why the court should not impose sentence at this time," *id.* at 26, and told the court at the end of the sentencing hearing that the court had not "left out anything," *id.* at 29. Thus, petitioner withdrew his unresolved objections to the PSR by confirming that the court could pronounce sentence without further factfinding. Accordingly, he cannot now claim that the district court erred by not conducting that factfinding. See *Hipolito-Sanchez*, 998 F.2d at 596; *Mapp*, 990 F.2d at 61.

2. The decision below does not conflict with any decision of this Court or of any other court of appeals.

Petitioner's reliance (Pet. 16) on *United States* v. *Caraza*, 843 F.2d 432 (11th Cir. 1988) (per curiam), and *United States* v. *Jones*, 972 F.2d 1345 (9th Cir. 1992) (Table), is misplaced.[6] Neither decision involved a defendant who withdrew his objections to the PSR. In *Caraza*, the defendant "orally raised a factual dispute" at the sentencing hearing, which "[t]he government concede[d]" was never resolved and involved facts on which the district court may have relied. 843 F.2d at 438. The court of appeals accordingly remanded the case for compliance with Rule 32(c)(3)(D). *Ibid.* In *Jones*, the defendant raised several objec-

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[6] Because the decision in *Jones*, No. 91-50786 (9th Cir. Aug. 27, 1992), is unpublished, it "shall not be regarded as precedent" under 9th Cir. R. 36-3. The text of the decision is available at 1992 WL 207902 and 1992 U.S. App. LEXIS 20798.

tions to the PSR but could not substantiate one of them at the sentencing hearing. The Ninth Circuit held that the objection was waived. The Ninth Circuit also determined, however, that the district court had failed to send a copy of the PSR to the Bureau of Prisons, and it remanded for completion of that "ministerial" task.

Nor does the decision below conflict with *United States* v. *Edgecomb*, 910 F.2d 1309 (6th Cir. 1990), as petitioner suggests (Pet. 23-24). There, the defendant filed written objections to the PSR before sentencing, and the PSR listed those objections as "UNRESOLVED OBJECTIONS." 910 F.2d at 1313. At sentencing, the court asked whether the defendant was "satisfied with the [PSR]" and the defendant answered in the affirmative. *Ibid.* The district court sentenced the defendant without resolving the objections listed in the PSR. The court of appeals agreed with the defendant that his failure to renew his objections to the PSR at the sentencing hearing was excusable "because a portion of the PSR already included his objections"; the court therefore remanded the case to the district court for more complete factual findings. *Id.* at 1313-1314.

Finally, petitioner is incorrect in asserting (Pet. 16-18) that the decision below conflicts with other decisions from the Fifth Circuit. The decisions on which petitioner relies (Pet. 14, 17, 19, 26, 27)—*United States* v. *Ramirez*, 963 F.2d 693, cert. denied, 113 S. Ct. 388 (1992); *United States* v. *Stouffer*, 986 F.2d 916, certs. denied, 114 S. Ct. 115, 114 S. Ct. 314 (1993); *United States* v. *Nnanna*, 7 F.3d 420 (1993) (per curiam); *United States* v. *Charroux*, 3 F.3d 827 (1993); *United States* v. *Billingsley*, 978 F.2d 861

(1992), cert. denied, 113 S. Ct. 1661 (1993); *United States* v. *Cockerham*, 919 F.2d 286 (1990)—are not inconsistent with the principle that a defendant may withdraw objections to his PSR. Moreover, any tension between the decision below and other decisions of the Fifth Circuit is a matter for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

MAY 1994

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CRIMINAL NO. A-90-CR-117(1)

UNITED STATES OF AMERICA

v.

STANLEY E. ADAMS

May 8, 1992

ORDER

Before the Court is the Defendant Adams' Supplement to Motion to Correct Pre-Sentence Investigation Report, filed April 24, 1992. Having reviewed and considered this motion, the Court is of the opinion that the motion should be GRANTED IN PART and DENIED IN PART.

IT IS ORDERED that the Pre-Sentence Investigation Report (the "Report") that has been filed with the Bureau of Prisons be AMENDED. At the Sentencing Hearing conducted before this Court on February 20, 1992, this Court ordered that certain corrections be made in the Report. Not all of those corrections were made. Specifically, the first sentence at the top of page 8 of the Report which states:

"The total loss resulting from the conspiracy was $9,349,579."

is HEREBY DELETED from the Report. This deleted sentence should in no way be considered by the Parole Commission. Additionally, the Parole Commission should itself reassess the Report, in light of this deletion, in determining the offense severity rating for the Defendant.

IT IS FURTHER ORDERED that the remaining issues raised in the Defendant's Motion are hereby DENIED.

IT IS FURTHER ORDERED that this Order be transmitted to the Parole Commission and be attached to the Report.

SIGNED AND ENTERED this *8th* day of May, 1992.

/s/ JAMES R. NOWLIN
JAMES R. NOWLIN
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CRIMINAL NO. A-90-CR-117(1)

UNITED STATES OF AMERICA

v.

STANLEY E. ADAMS

October 14, 1992

ORDER

Before the Court is the Defendant Adams' various motions for modification of sentence, and the supplements thereto, pursuant to Rule 35 of the Federal Rules of Criminal Procedure. Having reviewed and considered these motions and the supplement thereto, the Court enters the following opinion.

This Court hereby seeks to clarify its previous rulings and findings in this case. The Court did not mean to suggest that Defendant Adams caused no losses by his involvement in the conspiracy. The Court did expressly find that Defendant Adams and the Government had settled the amount of restitution owing for all of the losses caused. Specifically, the Court found that Defendant Adams owed no further restitution for losses resulting from the conspiracy.

Although Mr. Adams [*sic*] conduct did contribute to the losses incurred, Mr. Adams and the Government have agreed that Mr. Adams has reimbursed the Government for his full share of those losses. Although extensive losses did result, Mr. Adams does not owe any additional restitution for those losses. Mr. Adams has fully paid any restitution that he owed to the Government in this action. The Parole Commission and the Bureau of Prisons should indeed consider as a factor favorable to Mr. Adams that Mr. Adams has made full restitution to the Government in the present action and that Mr. Adams owes no further restitution to the Government in this action.

IT IS ORDERED THAT Defendant Adams' motions to modify his sentence are DENIED.

IT IS FURTHER ORDERED that all other motions pending before this Court in this action are hereby DENIED.

IT IS FURTHER ORDERED that the Clerk transmit a copy of this Order the United States Parole Commission and to the Bureau of Prisons.

SIGNED AND ENTERED this *14th* day of October, 1992.

/s/ JAMES R. NOWLIN
JAMES R. NOWLIN
United States District Judge

APPENDIX C

U.S. Department of Justice
Criminal Division

Washington, D.C. 20530
Friday, April 22, 1994

Mr. Burrell D. Johnston
1108 Nueces
Austin, TX 78701
BY FAX: (512) 478-2044

Re: *Stanley E. Adams* v. *United States*
Supreme Court No. 93-1348

Dear Mr. Johnston,

This letter is to confirm our conservation of 4:30 pm today in which you informed me that Appendix 9 to the petition for a writ of certiorari in the above-referenced case is a proposed order that was not actually signed by the district court. If this conforms to your understanding of our conversation, please sign below and return this letter to me by fax at (202) 514-8232.

Thank you very much.

Sincerely,
/s/ DAVID S. KRIS

DAVID S. KRIS
Attorney
Criminal-Appellate
Section
Department of Justice
P.O. Box 899

Ben Franklin Station
Washington, D.C. 20044

/s/ BURRELL D. JOHNSTON
BURRELL D. JOHNSTON
Attorney for Stanley E. Adams